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SENATE

REPORT
101-553

FEDERAL FACILITY COMPLIANCE ACT OF 1990

OCTOBER 24 (legislative day, OCTOBER 2), 1990.—Ordered to be printed

Mr. BURDICK, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1140]

The Committee on Environment and Public Works, to which was referred the bill (S. 1140) to provide that Federal facilities meet Federal and State environmental laws and requirements and to clarify that such facilities must comply with such environmental laws and requirements, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE AND SUMMARY

The purpose of the Federal Facility Compliance Act of 1990, S. 1140, is to make the waiver of sovereign immunity contained in section 6001 of the Solid Waste Disposal Act clear and unambiguous with regard to the imposition of civil and administrative fines and penalties. This legislation requires Federal facilities to comply with all Federal, State, interstate, and local solid and hazardous waste management and disposal requirements, both substantive and procedural, in the same manner, and to the same extent, as any person is subject to such requirements.

The Federal Facility Compliance Act of 1990 requires each Federal department, agency, and instrumentality to perform within 12 months of the date of enactment an assessment of releases of hazardous substances from each solid waste management unit at each hazardous substance treatment, storage, or disposal facility owned

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or operated by the department, agency, or instrumentality after November 19, 1980. The assessments must indicate whether or not a department, agency, or instrumentality is in compliance with the requirements of the Solid Waste Disposal Act, the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA), the Clean Air Act, the Clean Water Act, and the Toxic Substances Control Act.

The bill requires that the Environmental Protection Agency (EPA) annually inspect facilities owned or operated by a Federal department, agency, or instrumentality to enforce compliance with the Solid Waste Disposal Act, CERCLA, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act. Each Federal department, agency, or instrumentality whose facilities are inspected by the EPA would reimburse the EPA for the cost of such inspection.

The Federal Facility Compliance Act of 1990 also provides that the Administrator of the EPA may commence an administrative enforcement action against any Federal department, agency, or instrumentality. Under the terms of the bill, no administrative order issued to a Federal department, agency, or instrumentality would become final unless such department, agency, or instrumentality has had an opportunity to confer with the Administrator of the EPA.

BACKGROUND AND NEED FOR THE LEGISLATION

A cornerstone of Federal environmental law is that Federal agencies are subject to the same environmental requirements and must comply with those requirements in the same manner and to the same extent as all other persons. Institutions owned or operated by the Federal Government are at least as responsible, if not more responsible, for protecting the public health and safety and the environment as are private institutions. The Federal Government must set an exemplary record of compliance. Accordingly, the Solid Waste Disposal Act, the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, CERCLA, and the Toxic Substances Control Act all clearly specify that those laws apply to Federal facilities in the same manner and to the same extent as to all other persons.

With respect to solid and hazardous wastes, section 6001 of the Solid Waste Dispoal Act requires Federal departments, agencies, or instrumentalities to meet the substantive and procedural requirements of Federal, State, interstate, and local solid and hazardous waste disposal in the same manner and to the same extent as any person is subject to such requirements. Section 6001 of the solid Waste Disposal Act provides for the imposition of the injunctive relief and waives sovereign immunity with respect to the enforcement of injunctive relief by any State or Federal court.

There has existed some ambiguity as to whether or not section 6001 waives sovereign immunity for the imposition of civil penalties and fines. At present, the Solid Waste Disposal Act allows for the imposition of civil penalties and fines against private persons for violations of the Act's requirements. Three Federal courts of appeals, however, have held that the Act does not waive sovereign

immunity for the imposition of such fines and penalties against Federal departments, agencies, or instrumentalities. *State of Ohio* v. *U.S. Department of Energy,* No. 89-3329 (6th Cir., June 11, 1990); *State of New Mexico* v. *U.S. Air Force,* 1990 U.S. App. LEXIS 8144 10th Cir., May 21, 1990); *United States* v. *State of Washington,* 872 F.2d 874 (9th Cir. 1989). The U.S. District Court of Maine has held that the Act does contain such a waiver. *State of Maine* v. *Department of the Navy,* 702 F. Supp. 322 (D. Me. 1988).

The need to address this issue arises because of the magnitude of the Federal Government's problems in complying with Federal and State hazardous waste disposal laws. There exist thousands of Federal solid and hazardous waste treatment, storage, or disposal facilities throughout the United States that are not, or may not be, in compliance with applicable Federal, State, interstate, or local requirements. Many of these facilities may require clean-up for past or continuing contamination. Though the bulk of these facilities are, or were, owned or operated by the Department of Defense (DOD) and the Department of Energy (DOE), other Federal departments, agencies, or instrumentalities may own or operate, or may have owned or operated, such facilities.

Although the precise extent of the Federal Government's hazardous waste problems are not yet certain, they clearly are quite significant. According to the Congressional Budget Office (CBO), more than 2,300 facilities owned by the Federal Government handle hazardous wastes or contain hazardous waste contamination. *See* Congressional Budget Office, "Federal Liabilities Under Hazardous Waste Laws" (1990) (S. Prt. 101-95). In addition, there are more than 7,100 properties formerly owned by the Federal Government for which the Federal Government may have liabilities for hazardous waste contamination. The DOD, alone, has over 14,400 hazardous waste sites. As of November, 1989, Federal facilities comprised 114 of the 1,219 facilities on the National Priorities List requiring clean-up under CERCLA.

The DOE has far fewer sites with contamination than the DOD, but the DOE's sites contain the worst contamination. In particular, the Defense Weapons Complex, a group of 20 facilities where U.S. nuclear weapons are designed, tested, and produced, are contaminated with large quantities of radioactive and hazardous wastes, some of which have migrated offsite.

So far, Federal agencies have not completed much clean-up. With respect to the 724 facilities on the EPA's hazardous waste compliance docket that may require hazardous waste clean-up, Federal agencies have completed only 29 comprehensive investigations, known as Remedial Investigation/Feasibility Studies (RI/FS). Only 30 docket facilities have been cleaned-up. Additionally, the Federal Government may have significant hazardous waste liabilities for 8,253 facilities not on the Federal docket. Remedial action has been initiated at fewer than 200 of these facilities.

General Accounting Office (GAO) investigations have concluded that the Federal Government has been slow to comply with hazardous waste management laws. In May, 1986, the GAO released a report reviewing Resource Conservation and Recovery Act (RCRA) compliance at 17 Federal civilian agencies in 12 States and found that almost half of the hazardous waste handlers inspected by the

EPA were cited for violations. The GAO further found that a substantial portion of the cited facilities remained out of compliance for six months or more and some had been out of compliance for more than three years.

Similarly, the EPA reports difficulties with Federal faiclity compliance. Federal facility RCRA compliance statistics supplied by the EPA indicate that 63 percent of Federal treatment, storage or disposal facilities were found to have one or more Class I RCRA violations in fiscal year 1989, compared to a 38 percent Class I vilation rate for private facilities. (A Class I violation is defined as a violation that results in a release or serious threat of release of hazardous waste to the environment, or involves the failure to assure that ground water will be protected, that proper closure and post-closure activities will be undertaken, or that hazardous wastes will be destined for and delivered to permitted or interim status facilities.)

EPA and State enforcement officials have had historic problems with noncompliance at Federal hazardous waste facilities such as Portsmouth Naval Shipyard, Maine; U.S. Coast Guard Support Center, North Carolina; the DOE's Fernald and Mound facilities in Ohio; the DOE's plant at Rocky Flats, Colorado; and the DOE Hanford facility in Washington. Activities at these facilities have led to the unauthorized operation of many RCRA treatment and storage units, and extensive groundwater contamination.

Some Federal facilities such as Rocky Flats and Fernald, show a long history of environmental violations. At the Hanford Reservation, radioactive and mixed waste were dumped into unlined pits. The Columbia River is becoming contaminated by radioactive materials which leaked from single shell tanks at Hanford. The DOE had argued, between 1976 and 1984, that RCRA and State hazardous waste statutes did not apply to DOE facilities. (This particular issue has since been resolved; it is now clearly established that Federal facilities are subject to Federal, State, and local solid and hazardous waste requirements.) In 1984, the DOE refused to allow Washington State personnel to enter the Hanford Reservation. After the State file an intent to sue, its regulators were permitted access to Hanford.

The Fernald Feed Materials Production Center in Ohio has a history of over 35 years of pollution. The DOE has admitted full knowledge, since 1951, of pollution at the Fernald plant and has conceded that it has emitted more than 300,000 pounds of radioactive uranium particles into the air over the years, even though the DOE contractor operating the plan had warned the agency of the danger.

The ability to impose fines and penalties for violations of the Nation's environmental statutes is an important enforcement tool. As the EPA testified before the Committee, "penalties serve as a valuable deterrent to noncompliance and to help focus facility managers' attention on the importance of compliance with environmental requirements."

The importance of enforcement to maintaining Federal facility compliance is illustrated by a December, 1988, study performed by the GAO, "Water Pollution: Stronger Enforcement Needed To Improve Compliance at Federal Facilities" (GAO/RCED-89-13; De-

cember, 1988). GAO found that the rate of noncompliance for Federal facilities with priority National Pollutant Discharge Elimination System (NPDES) permit requirements was twice that of non-Federal industrial facilities. The GAO also found that a "fundamental barrier [to compliance] was the low priority that Federal facilities gave to correcting violations." It then reported that "regulators and Federal agency officials agreed that enforcement actions against noncompliant Federal facilities resulted in increased priority of environmental compliance and prompt corrective actions."

The Committee received considerable testimony from various State officials that the ability to impose fines and penalties is a necessary component of any program to enforce compliance with environmental requirements. Governors from the States of Washington, Idaho, Oregon, New Mexico, Ohio, Colorado, Tennessee, Nevada, South Carolina, Kentucky, Vermont, Connecticut, Florida, Maine, Minnesota, Montana, New York, New Jersey, and Wyoming; the National Governors' Association; and Attorneys General from the States of California, Connecticut, Colorado, Florida, Hawaii, Idaho, Kansas, Kentucky, Minnesota, Montana, Nevada, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont, Virginia, Washington, and Wyoming stated to the Commttee that civil penalty authority is necessary to ensure that Federal facilities fully comply with environmental requirements.

The Administration recognizes the Federal Government's environmental problems, and has committed itself to correcting the situation. The President and the Federal agencies with the largest environmental problems have stated their commitment to improving Federal agencies' compliance with the environmental laws.

In May 1988, President Bush, then Vice-President, stated:

> Unfortunately, some of the worst offenders are our own Federal facilities. As President, I will insist that in the future Federal agencies meet or exceed environmental standards. the Government should live within the laws it imposes on others.

In testimony before the Committee, the DOE stated that it "fully supports the underlying goal of S. 1140, which is to bring Federal facilities into compliance with applicable Federal and State environmental laws. The Department recognizes that its facilities must comply with all Federal and State environmental laws." The DOD testified that it "strongly supports the intent of the bill, which is to apply effective environmental compliance incentives to Federal agencis. The Department is 100 percent committed to compliance with all environmental laws and regulations." The DOJ testified that "the Administration shares the Committee's goal of ensuring that all Federal facilities reach and maintain full environmental compliance as expeditiously as possible." The EPA testified that "we support the purpose and objectives behind S. 1140 * * *. As the President has stated, the Federal Government should 'live within the laws it imposes on others.' "

WAIVER OF SOVEREIGN IMMUNITY

At present, RCRA is the only major Federal environmental statute for which a majority of courts have held that it is ambiguous

whether sovereign immunity has been waived with respect to the imposition of fines and penalties. It is necessary to remove this ambiguity to improve the pace of clean-up of existing contamination from past practices and to deter future violations.

The bill makes clear that administrative orders, and all civil and administrative fines and penalties, are considered "requirements" of the law to which the Federal Government is subject as is any other person. The bill also makes it clear that the United States expressly waives immunity for the purposes of enforcing any substantive or procedural requirement of solid or hazardous waste laws. Further, the bill amends the definition of person in section 1004(15) of the Solid Waste Disposal Act so that all of the provisions of that Act apply in the same manner and to the same extent to both Federal and non-Federal persons.

ENVIRONMENTAL ASSESSMENTS AND ANNUAL INSPECTIONS

The Federal Facilities Compliance Act of 1990 contains provisions for environmental assessments at, and inspections of, Federal facilities.

In order to enforce compliance and to ensure a thorough examination of Federal facilities' compliance with environmental laws, the bill requires environmental assessments and annual environmental inspections. Such assessments and inspections should provide each Federal facility owner and operator with a thorough understanding of environmental problems that exist, their nature and extent, and actions necessary to bring the facility into compliance.

Environmental assessments would be conducted by a Federal department, agency, or instrumentality in order to characterize the nature and extent of any releases from solid waste management units at any treatment, storage, or disposal facility owned or operated by such department, agency or instrumentality. The assessments are to be completed within twelve months of the date of enactment of the Federal Facilities Compliance Act of 1990. They are to indicate whether a facility or a Federal department, agency or instrumentality is in compliance with the applicable requirements of the Solid Waste Disposal Act, CERCLA, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act.

In addition, the EPA is required to inspect annually each facility owned or operated by a Federal department, agency or instrumentality. The inspections must include an analysis of comprehensive groundwater monitoring. The owner or operator of the inspected facility is required to pay for the cost of the inspection.

These initiatives are not new in the environmental field. Each year, more and more private sector facilities conduct self-audits for the purpose of ensuring compliance with the relevant environmental statutes. Such audits are also utilized to assist private facilities in reducing wastes at the sources—"waste minimization".

EPA ADMINISTRATIVE ORDER AUTHORITY

Section 3(b) of the Federal Facility Compliance Act of 1990 authorizes the Administrator of the EPA to commence an administrative enforcement action against any department, agency, or instru-

mentality of the executive, legislative, or judicial branch of the Federal Government. The Administrator is required to initiate an administrative enforcement action against a Federal department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person.

The clarification of this authority is necessary because, in the past, other Federal agencies, including the DOJ, have disputed EPA's authority to issue administrative orders against other Federal agencies. The Reagan Administration sought to invoke the "unitary executive" theory to prevent the EPA from issuing administrative orders against other Federal agencies. This theory purports to establish that one Federal executive department, agency, or instrumentality may not require another to act in a particular manner. Under this theory, disputes between agencies within the executive branch can only be resolved by the President.

The unitary executive theory, however, has never been accepted by the courts. Indeed, the Supreme Court has rejected the interpretations of the "take care" clause of the constitution relied on to support the unitary executive theory. *Kendall ex rel Stokes* v. *United States*, 37 U.S. (12 Pet.) 524, 610 (1838) ("* * * duty and responsibility grow out of and are subject to the control of the law, and not the direction of the President."); *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988); *Lear Siegler, Inc.* v. *Lehman*, 842 F.2d 1102 (9th Cir. 1988) ("To construe this duty to faithfully execute the laws as implying the power to forbid their execution preverts the clear language of the 'take care' clause."). *See also* Congressional Research Service, "Congressional Control of Agency Decision and Decisionmakers: The Unitary Executive Theory and Separation of Powers," No. 87-838A (1987).

Accordingly, the language contained in the Federal Facility Compliance Act of 1990 with respect to administrative orders clarifies existing law, so as to provide the EPA with clear administrative enforcement authority sufficient to ensure Federal facility compliance. No such administrative order shall become final until the recipient department, agency or instrumentality has had the opportunity to confer with the EPA Administrator.

COSTS

On July 27, 1990, the EPA published in the Federal Register a proposed rule for RCRA corrective action requirements. Included in the preamble of the proposed rule is the EPA's estimate of the cost of corrective action at Federal facilities. Based on the requirements detailed in the proposed rule, the EPA stated that the Federal facilities clean-up cost "is likely to range between $3 billion and $18 billion."

The CBO has estimated that DOD and DOE costs would range between $81 and $117 billion. (S. Prt. 101-95). The CBO noted that its estimates for DOE include, in addition to corrective action estimates, costs for environmental compliance for all the DOE facilities pursuant to all environmental statutes; costs of the DOE's wastewater management operations; costs of research and oper-

ational activities; and compliance costs for waste management treatment, and minimization research.

SECTION-BY-SECTION ANALYSIS

Section 1: Short Title

The short title of the bill is "The Federal Facility Compliance Act of 1990".

Section 2: Facility Environmental Assessments

This section requires each department, agency, and instrumentality of the United States to assess the extent and nature of releases of hazardous substances from each solid waste management unit owned or operated by each such Federal department, agency, or instrumentality after November 19, 1980.

The assessments are to be completed within 12 months after the enactment of this bill, and shall be provided to the EPA and to the State in which the facility is located. The assessments shall indicate the extent to which the facility and the department, agency, or instrumentality is in compliance with the Solid Waste Disposal Act, CERCLA, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act.

This section also directs the EPA to conduct annual inspections of Federal facilities subject to the environmental laws listed above to determine the extent of compliance with such laws, and to determine whether any enforcement actions are necessary to bring the facility into compliance. The EPA is not required under this section to annually inspect all Federal property; the EPA is required to inspect only those facilities for which environmental compliance may be at issue. The department, agency, or instrumentality owning a facility that is inspected by the EPA shall reimburse the EPA for the costs of the inspection.

Section 3: Application of Certain Provisions to Federal Facilities

Section 3 makes it unambiguous that the United States waives any sovereign or otherwise applicable immunity for the imposition of civil or administrative fines and penalties for violation of any Federal, State, interstate or local requirement regarding solid or hazardous waste control or disposal. The section amends section 6001 of RCRA to make it clear that the term "requirements" in that section includes all administrative orders, civil penalties, and fines.

No Federal employee shall be liable for any civil penalty under Federal or state solid or hazardous waste law for any act or omission within the employee's scope of official duties. The bill does not alter any standard for, impose, or otherwise affect any criminal liability of any Federal employee. The bill provides, however, that no Federal agency, department, or instrumentality shall be subject to any criminal sanction for violation of any Federal or State hazardous waste law.

Section 3(b) provides that the EPA may commence an administrative enforcement action against any Federal department, agency, or instrumentality. Such actions shall be initiated in the same manner and under the same circumstances as an action

would be initiated against any other person. No administrative order issued to a Federal agency, department, or instrumentality shall become final until such agency, department, or instrumentality has had the opportunity to confer with the Administrator of the EPA.

This section also authorizes the head of a Federal department, agency, or instrumentality to provide legal representation for an employee in State criminal proceedings, provided that the actions for which the representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. This authorization for representation is consistent with current DOJ guidelines for providing representation in State criminal proceedings. 28 C.F.R. Sec. 50.15 (1990).

In Federal criminal proceedings, the head of a Federal department, agency, or instrumentality may reimburse an employee for reasonable defense costs, provided such employee is not indicated, for actions performed within the scope of his or her employment. It is anticipated that such funds would not be expended when such expenditures would be inimical to the interests of the United States. This provision should not be interpreted to authorize representation in Federal criminal proceedings in a manner that is inconsistent with current DOJ guidelines, but the provision is intended to authorize the reimbursement for defense costs incurred in Federal criminal proceedings if such proceedings do not result in a Federal criminal indictment. This is similar to the policy for reimbursement of attorney's fees in the Ethics in Government Act, 28 U.S.C. Sec. 593(f).

Section 4: Person

Section 4 amends section 1004(15) of the Solid Waste Disposal Act so that the definition of "person" includes each department, agency, and instrumentality of the United States.

HEARINGS

The Committee on Environment and Public Works held a hearing on S. 1140, the Federal Facility Compliance Act of 1990, on May 2, 1990.

The Committee received testimony from Senator Pete Wilson, from representatives of the Department of Justice, the Department of Energy, the Department of Defense, and the Environmental Protection Agency, from representatives of the States of Washington, Colorado, Maine, and Ohio, and from representatives of environmental groups.

ROLCALL VOTES

Section 7(b) of rule XXVI of the Standing Rules of the Senate and the rules of the Committee on Environment and Public Works require that any rollcall votes taken during consideration of this bill be announced in this report.

Two rollcall votes were taken during the consideration of this bill by the Committee on Environment and Public Works. Senator Chafee offered an amendment in the nature of a substitute to es-

tablish a methodology for the prioritization of corrective action and closure requirements and to specify the circumstances under which the waiver of sovereign immunity for fines and penalties would apply for violations of corrective action and closure requirements. The amendment failed by a vote of 9–6. In support of the amendment were Senator Chafee, Simpson, Symms, Durenberger, Warner and Jeffords. In opposition were Senators Burdick, Moynihan, Mitchell, Baucus, Lautenberg, Reid, Graham, Lieberman, and Metzenbaum.

The Committee ordered the bill to be reported by a vote of 15–0. In support of the bill were Senators Burdick, Moynihan, Mitchell, Baucus, Lautenberg, Reid, Graham, Lieberman, Metzenbaum, Chafee, Simpson, Symms, Durenberger, Warner, and Jeffords.

EVALUATION OF REGULATORY IMPACT

In accordance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact of the report bill:

The bill amends current law by requiring each Federal department, agency, or instrumentality to conduct an assessment of the releases of hazardous substances from each solid waste management unit at each hazardous substance treatment, storage, or disposal facility owned or operated by the department, agency, or instrumentality after November 19, 1980. The bill would also amend curent law by requiring the EPA to conduct annual inspections of Federal facilities subject to the environmental laws to enforce compliance with those laws.

This should not impose any additional regulatory requirements of burdens upon the Federal government or its contractors. The assessments and inspections undertaken pursuant to this section are intended to improve compliance with existing law and do not impose any significant, new substantive requirements upon the Federal government or its contractors.

The bill amends current law by establishing a waiver of sovereign immunity with respect to fines and penalities issued against Federal agencies for violations of solid or hazardous waste requirements. The bill also amends current law by providing that the EPA may take administrative enforcement actions against a Federal department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person, and specifies the procedures that the EPA must follow in issuing administrative orders. These amendments do not impose or authorize the imposition of any new regulatory requirements upon the Federal government or its contractors; rather it expressly provides for the use of a specific type of sanction that may be imposed upon a Federal agency, and the procedures for its use, for violations of existing requirements.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires each report to contain a statement of the cost of the reporting bill prepared by the Congressional Budget Office. That statement has been requested. However, it is the opinion of the Committee that in order to expedite the business of the Senate, it is necessary to file this report without the statement.

ADDITIONAL VIEWS OF SENATORS CHAFEE, SIMPSON, SYMMS, DURENBERGER, AND WARNER

The Committee on Environment and Public Works has labored mightily over a number of months to address the question that is the subject of S. 1140, the Federal Facilities Compliance Act. The deliberations on this bill were arduous, and we supported a substitute, as well as several other amendments, that would, in our collective judgment, better address the problems associated with environmental contamination at federal facilities around the country. Although we voted to report the bill from the Committee after our substitute was not adopted, we believe it is important to set forth these additional views in order to explain the important issues involved.

As an initial matter, we should be clear on what is at issue here—and we should be equally clear on what is not at issue. Federal facilities must comply with environmental laws—no legislation is needed to clarify the current laws on this point.

There has been a great deal of confusion about S. 1140. In light of this confusion, it is important to understand what this bill really does. Since it is plain that no legislation is needed to require Federal facilities to comply with environmental laws, we must focus on the real issue that is addressed by S. 1140. And we are constrained to observe that the real issue is not readily apparent on the face of the bill itself.

Specially, on the first page of the bill—page one of S. 1140—immediately preceding the enacting clause, the following language appears:

> A bill to provide that Federal facilities meet Federal and State environmental laws and requirements and to clarify that such facilities must comply with such environmental laws and requirements.

It would be difficult to argue with this stated purpose, and we have no reason to do so. The difficulty, however, is as we noted earlier in these views: No legislation is needed to accomplish this stated purpose and, in fact, that is not what this bill does.

Stated crisply, this bill does not directly address the requirement that Federal facilities comply with environmental laws. Instead, this bill speaks to a separate issue. It amends the sovereign immunity provisions of RCRA, the Resource Conservation and Recovery Act, which is the Federal hazardous waste law that generally addresses the management, handling, and treatment of such wates at operating facilities. The issue here is not whether federal facilities must comply with RCRA or related State and local laws. Section 6001 of RCRA very clearly and explicitly states that Federal facilities—

> shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid and hazardous waste disposal.

Under current law, if a facility fails to comply, States and citizens can—and do—take enforcement action. In addition to filing actions under the citizens suits provision of RCRA, States can issue compliance orders under current law which are fully enforceable in a court action for injunctive relief.

The issue presented by this bill is not a question of compliance; nor is it the ability of States to enforce the law. It is simply a question of how many tools are to be given to the State and local governments in their enforcement efforts, and what conditions, if any, are going to apply with respect to the use of those tools.

Specifically, the issue is this: In addition to their ability to seek injunctive relief, can State and local governments collect monetary fines and penalties from the Federal Government for violations of laws regulating hazardous and solid wastes? This bill answers that question in the affirmative. In so doing, it changes the law to reverse the holdings of three Federal Circuit Courts of Appeal, each of which have determined that section 6001 of RCRA in its current form does not allow State and local governments to collect such fines and penalties. Those cases are as follows: *State of Ohio* v. *United States Department of Energy,* No. 89–3329 (6th Cir., June 11, 1990); *State of New Mexico* v. *United States Air Force,* 1990 U.S. App. LEXIS 8144 (10th Cir., May 21, 1990); *United States* v. *State of Washington,* 872 F.2d 874 (9th Cir. 1989).

This bill waives the sovereign immunity of the United States for fines and penalties when and if there is a violation of the law. It waives sovereign immunity completely and unconditionally.

The biggest problem with S. 1140 in its current form is its failure to distinguish between penalties for ongoing compliance violations, on the one hand, and penalties for failure to undertake clean up of past contamination on the other.

Penalties for on-going compliance violations make sense. We agree with that part of the bill. Exposure for monetary fines and penalties can have an important deterrent effect. On the other hand, penalizing the Federal Government for failure to clean-up past contamination does not make sense *unless* the failure violates an agreement or commitment to do the clean-up.

Clearly, the Federal Government must clean these sites up. That is not the issue. The problem is that this bill would subject the United States to fines and penalties for failing to clean-up these old sites as quickly as each State or local government official demands the cleanup to be accomplished.

Everyone wants these sites to disappear. We want them cleaned up as soon as possible, and would prefer in fact that they had already been cleaned up. Unfortunately, we cannot satisfy everyone. There are simply too many sites that require clean-up.

In May of this year, the Congressional Budget Office issued a report entitled, "Federal Liabilities Under Hazardous Waste Laws." It noted that the Federal Government owns or is responsible for thousands of facilities and sites contaminated by toxic

wastes. The estimated cost for cleaning up these sites is more than $150 billion dollars.

The Department of Defense estimates that this bill, S. 1140, would increase their costs by 40 percent. The sad fact is that every dollar paid for fines and penalties under this bill represents a dollar that will not be available to clean up the site.

We are not alone in our concerns with respect to S. 1140. Last June, this Committee received letters from several of our colleagues on the Armed Services and the Energy and Natural Resources Committees. A copy of that letter is included and reprinted in this report following our supplemental views.

In light of the concerns that we share with others with respect to the effect of S. 1140, we offered an amendment in the nature of a substitute for the Committee's consideration. Like S. 1140, this amendment would have expanded RCRA's waiver of sovereign immunity to include liability for State and local fines and penalties. The key difference is that the amendment would have made a distinction between current, on-going compliance violations and the backlog of old, inactive sites that are contaminated and need to be cleaned up.

This distinction is only relevant with respect to fines and penalties. The waiver that is in current law for all other enforcement actions, including suits for injunctive relief, would have been unaffected by the amendment be unchanged and would continue to apply unconditionally to all violations.

Solely with respect to fines and penalties, the amendment would have added an explicit, *unconditional* waiver for ongoing "compliance" violations.

It would also have added an explicit *conditional* waiver for fines and penalties for violations of clean-up requirements at old, inactive sites.

Under the amendment, this conditional waiver would also have applied in cases where there is a violation of closure requirements if the cost of compliance would cost more than $25 million. If the cost were less than $25 million, the unconditional waiver would have applied.

Under the conditional waiver proposed in our defeated amendment, a state could have imposed fines and penalties if the violation constituted an "imminent hazard" under RCRA or if it violated a commitment or binding agreement to clean up a site. This commitment could be found in a permit or closure plan under RCRA, or in a judicial order, consent order or compliance agreement.

As a general rule, the waiver for fines and penalties would also have extended to violations of unilateral, administrative orders. The exception—the "condition" in our amendment—was this: the waiver would not have applied to violations of unilateral administrative orders if the Federal agency established that it was unable to comply with the order. Specifically, under our amendment the Federal agency would have had to prove that the violation was a direct result of the agency's fulfillment of obligations at other sites under the first two situations—situations where the government was operating under permits, closure plans, judicial orders, consent

orders, compliance agreements, or judgments involving "imminent hazards".

Under the amendment, in determining whether the Federal agency had established its "inability to comply" and, therefore, its immunity from fines and penalties, courts were not to consider a lack of appropriations to the federal agency involved unless the President had identified, in an annual report to Congress, the amount of appropriations needed to fulfill the obligations at other sites and the Congress failed to appropriate the necessary funds.

Our amendment also provided that, if the agency made the requisite showing and was thereby relieved from liability for fines and penalties relating to violations of a unilateral administrative order, it would be required to—

(A) apply for a permit or closure plan regarding the site in question, or

(B) attempt to negotiate an administrative or civil consent order or compliance agreement as soon as possible.

If the Federal and State or local governments had not resolved the dispute within 24 months after the original order was issued (or 36 months after enactment of this bill, whichever is later)—for example, by agreeing to the issuance of a permit, closure plan, administrative or civil consent order, or compliance agreement—our amendment would have provided that the waiver of sovereign immunity would, at that time, apply without limitation.

This is an important point. The net effect of our amendment and the provision just described would have been as follows:

(1) there would have been an immediate, unconditional waiver of sovereign immunity for fines and penalties for all ongoing compliance violations;

(2) there would have been an immediate waiver for violations of binding agreements and commitments to clean-up all old, inactive sites; and

(3) if a State issued an order regarding an old contaminated site, starting 12 months after enactment of this bill, the Federal Government would have been granted only 24 months to reach agreement with the State. After that, there would have been a complete, unconditional waiver of sovereign immunity.

In addition to the elements already described, our amendment also would have—

(1) directed EPA to establish within 12 months, a priority system for cleaning-up these old, inactive sites;

(2) statutorily defined "corrective action" to draw a clear distinction between "compliance" (for which immunity is waived completely and unconditionally) and "clean-up" (for which conditions would be placed on the waiver for fines and penalties);

(3) statutorily defined "closure" in a manner that made the waiver of sovereign immunity conditional only for violations of closure requirements costing more than $25 million per unit; and

(4) limited the allowable uses of funds collected from the Federal Government and required that the money be used by States and local governments for environmental programs.

In our view, our amendment would have strengthened the hand of state and local governments seeking to enforce compliance at

active federal facilities. At the same time, it would have forced the federal government to work with the states and develop an enforceable plan to clean-up the old, contaminated sites that are scattered all across the nation. In short, our amendment constituted the preferable approach to the issue of environmental contamination at federal facilities.

Copies of the amendment and a memorandum explaining the amendment are included and reprinted in this report following our supplemental views.

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC, June 11, 1990.

Hon. JOHN H. CHAFEE,
Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR JOHN: We are concerned about the impact of S. 1140, the Federal Facility Compliance Act of 1989, on the Department of Defense and the Department of Energy. One of the provisions of this bill would waive sovereign immunity and allow states to impose civil fines and penalties against federal facilities to enforce compliance with the Resource Conservation and Recovery Act (RCRA).

Under current law, federal facilities, such as the Department of Defense and the Department of Energy installations, must comply with the RCRA. At the same time, however, the federal agencies should be free to establish cleanup priorities and schedules, in consultation with the states, that protect the public health and safety and ensure an orderly and cost effective cleanup process. Under S. 1140, the individual states, not the federal agencies or Congress, would dictate the timetable, the amount, and the direction of federal spending for environmental cleanup at federal facilities.

Funds currently programmed for much needed cleanup and compliance activities would be diverted to pay fines and penalties. Moreover, the states would be forced to compete among themselves, not to ensure compliance with the RCRA, but to ensure that they get a share of the fines and penalties. There is no guarantee that fines and penalties collected by the states would be applied to clean up the offending sites; the money would simply go into state treasuries. A much more productive expenditure of federal dollars would be achieved if those dollars were spent on cleanup and compliance activities rather than fines and penalties.

We believe that S. 1140 in its present form would have a serious impact on federal facilities and national defense activities. Some estimates of potential liabilities under S. 1140 rival the cleanup costs themselves. We urge you to reconsider the bill as written. To that end we would like to work with you to amend the bill to assure that the Department of Defense and the Department of Energy meet their environmental compliance obligations in a rational and orderly manner.

Sincerely,

SAM NUNN,
Chairman.
J. JAMES EXON,
Member.

ALAN J. DIXON,
Member.
J. BENNETT JOHNSTON,
Chairman, Committee on Energy and Natural Resources.
JOHN W. WARNER,
Ranking Minority Member.
STROM THURMOND,
Member.
SLADE GORTON,
Member.
JAMES A. MCCLURE,
Ranking Minority Member, Committee on Energy and Natural Resources.

CHAFEE AMENDMENT TO S. 1140

Strike all after the enacting clause and insert in lieu thereof the following new text:

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Facility Compliance Act of 1990".

FACILITY ENVIRONMENTAL ASSESSMENTS

SEC. 2. (a) Each department, agency, and instrumentality of the United States shall perform an assessment of each facility which the department, agency, or instrumentality owns or operates or has owned or operated at which hazardous substances (including hazardous constituents thereof are stored, treated, or disposed of or have been disposed of at anytime. Such assessments shall (A) indicate whether such facility and department, agency, or instrumentality is in compliance with applicable requirements of the Solid Waste Disposal Act, the Comprehensive Emergency Response, Compensation, and Liability Act, the Emergency Planning and Community Right-To-Know Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act and (B) unless such information has been previously provided to the Environmental Protection Agency and to the State in which the facility is located, such assessments shall be completed and so provided within twelve months after the date of enactment of this Act.

(b) FACILITY INSPECTIONS.—The Administrator of the Environmental Protection Agency shall undertake a thorough inspection annually of each facility owned or operated by a department, agency, or instrumentality of the United States to enforce compliance with the Solid Waste Disposal Act, the Comprehensive Emergency Response, Compensation, and Liability Act, the Emergency Planning and Community Right-To-Know Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act. Each annual inspection shall include an analysis of comprehensive groundwater monitoring. The records of

such inspection shall be available to the public in the same manner as provided in section 3007(b) of the Solid Waste Disposal Act.

CORRECTIVE ACTION AND CLOSURE PRIORITIES

SEC. 3. (a) ESTABLISHMENT OF METHODOLOGY.—(1) Within 12 months after the date of enactment of this Act, the Administrator of the Environmental Protection Agency, in consultation with the head of each department, agency, and instrumentality of the United States that owns or operates or has owned or operated a facility subject to section 2(a) of this Act, the Governors and Attorneys General representing States in which such facilities are located, and representatives of the National Conference of State Legislatures, shall—

(A) establish by rule, after notice and an opportunity for public comment, a methodology to set priorities for implementation of applicable corrective action requirements and closure requirements at all such facilities, and

(B) transmit a report to the Congress regarding the methodology established. The report shall indicate the extent to which the method reflects a consensus on the part of the Administrator, the affected Federal agencies, the Governors and Attorneys General of the affected States, and the representatives of the National Council of State Legislatures.

The Administrator shall provide a copy of the report to the Governor and Attorney General of each State.

(2) Solely for purposes of this section, "corrective action requirements" means requirements under sections 3004(u), 3004(v), and 3008(h) of the Solid Waste Disposal Act, or under State, interstate, or local law, compact or regulation, to respond to a release or threatened release of a hazardous substance into the environment from any solid waste management unit which stopped receiving solid or hazardous waste on or before July 26, 1982.

(3) Solely for purposes of this section, "closure requirements" means requirements under the Solid Waste Disposal Act, or under State, interstate, or local law, compact, or regulation, other than corrective action requirements, to remove or contain a hazardous substance at a solid waste management unit in the course of converting the unit into an inactive solid waste management unit that will not receive any additional solid or hazardous waste, but only to the extent the cost of implementing such requirements at the unit is estimated to exceed $25 million.

(b) RELATIONSHIP TO WAIVER OF SOVEREIGN IMMUNITY.—(1) Nothing in this Act shall be construed, interpreted, or applied to limit the waiver of soveign immunity under section 6001 of the Solid Waste Disposal Act except with respect to imposition of fines and penalties for violation of corrective action requirements or closure requirements.

(2) Except as provided in paragraph (3) of this subsection, the waiver of sovereign immunity under section 6001 of the Solid Waste Disposal Act with respect to imposition of fines and penalties for violation of corrective action requirements or closure requirements shall apply only to the extent such requirements are set forth in an applicable—.

(A) administrative or civil consent order, agreement, or judicial order;

(B) permit or closure plan issued under the Solid Waste Disposal Act, or under a State, interstate, or local law, compact, or regulation; or

(C) administrative or civil order issued under section 7003 of the Solid Waste Disposal Act, or under a comparable State, interstate, or local law, compact, or regulation.

(3)(A) The waiver of sovereign immunity under section 6001 of the Solid Waste Disposal Act with respect to imposition of fines and penalties for violation of corrective action requirements or closure requirements shall apply if a department, agency, or instrumentality of the United States violates any other order to implement corrective action requirements or closure requirements unless the department, agency, or instrumentality establishes, by a preponderance of the evidence, that the violation of such requirements is a direct result of the department's, agency's, or instrumentality's fulfillment of its obligations to implement corrective action requirements or closure requirements at other sites under—

(i) administrative or civil consent orders, agreements, or judicial orders issued prior to the date of such order;

(ii) permits issued under the Solid Waste Disposal Act, or under a State, interstate, or local law, compact, or regulation, prior to the date of such other order; or

(iii) administrative or civil orders issued under section 7003 of the Solid Waste Disposal Act, or under a comparable State, interstate, or local law, compact, or regulation.

In determining whether the violation of such requirements is a direct result of the fulfillment of obligations to implement corrective action requirements or closure requirements at other sites, the court shall not consider whether the violation was due to lack of appropriation unless the President has identified in an annual report to the Congress the amount of appropriations necessary to fulfill such obligations and the Congress failed to make available such appropriations. Nothing in this paragraph shall be construed, interpreted, or applied to affect or modify the obligation of each department, agency or instrumentality of the United States to comply with all Federal, State, interstate, and local requirements respecting control or abatement of solid waste or hazardous waste disposal and management, including but not limited to corrective action requirements or closure requirements or orders to implement such requirements.

(B) If a department, agency, or instrumentality establishes under subparagraph (A) that the waiver of sovereign immunity under section 6001 of the Solid Waste Disposal Act with respect to imposition of fines and penalities for violation of corrective action requirements or closure requirements at a solid waste management unit does not apply—

(i) the department, agency, or instrumentality shall—.

(I) apply for a permit or approval of a closure plan; or

(II) attempt to negotiate an administrative or civil consent order or compliance agreement that sets forth correc-

tive action requirements or closure requirements applicable to the unit; and

(ii) effective thirty-six months after the date of enactment of this Act or twenty-four months after the date of issuance of an order that sets forth corrective action requirements or closure requirements applicable to the unit, whichever is later, the waiver shall apply without limitation, unless the State, interstate or local authority that issued the order has issued or approved a superceding permit, closure plan, administrative or civil consent order, or compliance agreement.

APPLICATION OF CERTAIN PROVISIONS TO FEDERAL FACILITIES

SEC. 4. (a) IN GENERAL.—Section 6001 of the Solid Waste Disposal Act (42 U.S.C. 6961) is amended—

(1) by inserting "(a) IN GENERAL.—" after "6001.";

(2) in the first sentence, by inserting "administrative orders, civil and administrative penalties and fines and" immediately after "(including";

(3) in the first sentence, by inserting "and management" before "in the same manner"; and

(4) by adding the following new subsections—

"(b) ENFORCEMENT AND PENALTIES.—The United States hereby expressly waives any immunity otherwise applicable to the United States for purposes of judicial or administrative actions seeking to enforce any Federal, State, interstate, or local requirement respecting control or abatement of solid waste or hazardous waste disposal and management. Such waiver includes but is not limited to injunctive relief, administrative orders, and, subject to the provisions of the Federal Facility Compliance Act of 1990, civil penalties or fines imposed judicially or administratively for violation of any such requirement. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal or State solid or hazardous waste law with respect to any act or omission within the scope of his official duties. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. Unless a State constitution requires the funds to be used in a different manner, all funds collected by a State, or a political subdivision of a State, from the United States as a fine or penalty imposed for violation of any substantive or procedural requirement referred to in this section shall be used by the State, or political subdivision, only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.".

(b) ADMINISTRATIVE ENFORCEMENT ACTIONS.—Such section is further amended by adding at the end the following new subsection—

"(d) ADMINISTRATIVE ENFORCEMENT ACTIONS.—(1) The Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pur-

suant to the enforcement authorities contained in this Act. The Administrator shall initiate an administrative enforcement action against such a department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person. Any voluntary resolution or settlement of such an action shall be set forth in a consent order.

"(2) No administrative order issued to such a department, agency, or instrumentality shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator.".

DEFINITION

SEC. 5. (a) PERSON.—Section 1004(15) of the Solid Waste Disposal Act (42 U.S.C. 6903) is amended by adding the following before the period: "and shall include each department, agency, and instrumentality of the United States.".

EXPLANATION OF CHAFEE AMENDMENT TO S. 1140

The attached amendment would retain the two essential features of S. 1140. First, it would clarify that Federal facilities must comply with all Federal, State and local laws regulating hazardous and solid wastes, including RCRA. The courts consistently have held that Federal facilities must comply with these laws in the same manner as private entities.

Second, it would expand RCRA's section 6001 waiver of sovereign immunity to include liability for State and local judicial and administrative civil penalties. The courts have reached varying results in these cases. Although some district courts have interpreted the existing waiver to include liability for civil penalties, the three Courts of Appeals that have addressed the issue (the 6th, 9th and 10th Circuits) have interpreted the existing waiver narrowly and have held that it does not include liability for civil penalties.

This memo includes: (1) an outline of the program established by the amendment; (2) a comparison of the amendment to S. 1140; and (3) a section-by-section analysis of the amendment.

(1) *Outline of the program established by the amendment*

(A) *Development of a priority system*

Within 12 months, EPA must (i) consult with other agencies, Governors and Attorneys General of affected States, and representatives of the National Council of State Legislatures, (ii) establish by rule, after notice and an opportunity for public comment, a methodology for setting priorities for implementation of "corrective action" and "closure requirements" at federal facilities, and (iii) transmit a report to Congress.

"Corrective action requirements" is defined solely for purposes of this Act to mean "requirements under sections 3004(u), 3004(v), and 3008(h) of the Solid Waste Disposal Act, or under State, interstate, or local law, compact or regulation, to respond to a release or threatened release of a hazardous substance into the environment from any solid waste management unit which stopped receiving waste on or before July 26, 1982" (the date regulations applicable

to hazardous waste land disposal units were promulgated under RCRA subtitle (C)).

"Closure requirements" is defined solely for purposes of this Act to mean "requirements under the Solid Waste Disposal Act, or under State, interstate, or local law, compact or regulation, other than corrective action requirements, to remove or contain a hazardous substance at a solid waste management unit in the course of converting the unit into a solid waste management unit that will not receive any solid or hazardous waste, but only to the extent the cost of compliance with such requirements is estimated to exceed $25 million."

(B) *Waiver of sovereign immunity*

The amendment would expand the waiver in RCRA section 6001 to include a waiver for fines and penalties. For one class of violations, the waiver would be unconditional. For another class of violations, the waiver would be conditional. In both cases, the allowable uses of fines and penalties collected from the federal government would be limited to environmental programs.

With respect to fines and penalties for failure to comply with requirements *other than* corrective action or closure requirements (as defined above), the waiver would be *unconditional.*

Solely with respect to fines and penalties for violations of corrective action or closure requirements (as defined above), the waiver would be made *conditional* by limiting it to four situations. Specifically, the waiver would apply to violations of—

First, an administrative or civil consent order, agreement, or judicial order for corrective action or closure;

Second, a permit issued under the Solid Waste Disposal Act (including RCRA), or under a State, interstate, or local law, compact, or regulation, that sets forth corrective action or closure requirements;

Third, an administrative or civil order issued under section 7003 of the Solid Waste Disposal Act (relating to imminent hazards) or a comparable State, interstate, or local law, compact, or regulation; and

Fourth, any other order to implement corrective action or closure requirements *unless* the Federal agency establishes, by a preponderance of the evidence, that compliance with such order would result in the Federal agency's inability to fulfill its obligations under the first three situations.

With respect to the fourth situation, in determining whether the Federal agency has established that compliance with such order or requirement would result in the Federal agency's inability to fulfill its obligations under the first three situations, the court shall *not* consider the lack of appropriations *unless* the President has identified in an annual report to Congress the amount of appropriations necessary to fulfill such obligations and the Congress failed to make available such appropriations.

If an agency makes the requisite showing under the fourth situation and prevents the imposition of fines or penalties for violation of corrective action or closure requirements in such "other" order, the agency must apply for a permit or closure plan regarding the site in question, or attempt to negotiate an administrative or civil

consent order or compliance agreement as soon as possible. Effective 24 months after the date of issuance of the order (but not prior to 36 months after enactment of this Act), unless the order has been superseded by issuance of a permit, closure plan, administrative or civil consent order, or compliance agreement (in which case the first or second situation will apply), the waiver of sovereign immunity shall apply without limitation.

(2) *Comparison of amendment to S. 1140*

(A) Part 1 of S. 1140 *and* the amendment would not amend RCRA but would create separate new requirements.

S. 1140 requires "assessments" of compliance status at Federal facilities and annual EPA inspections to enforce compliance with 6 listed Federal environmental laws.

The amendment *retains* these requirements *and adds* a new requirement for EPA to establish, within 12 months, a methodology to set priorities for implementation of applicable corrective action and closure requirements at all Federal facilities. The agency must also transmit a report to Congress regarding the methodology established.

Part 1 of the amendment also (i) expands the list of Federal environmental laws to include the Emergency Planning and Community Right To Know Act, and (ii) sets forth the relationship between this Act (the Federal Facility Compliance Act) and the waiver of sovereign immunity in section 6001 of RCRA, as amended by this Act.

(B) Part 2 of S. 1140 *and* the amendment would amend the waiver of sovereign immunity in RCRA section 6001.

S. 1140 restates the existing waiver (shall be subject to and comply with all Federal, State, interstate and local requirements) and adds—

(i) an explicit waiver for "fines, penalties and administrative orders" for violations (with no distinction made between compliance and corrective action/closure); and

(ii) EPA administrative order authority.

The amendment—

(i) restates the existing waiver;

(ii) by reference to the Federal Facility Compliance Act of 1990, adds (I) an explicit, *unconditional* waiver for "fines, penalties and administrative orders" for violations of requirements other than corrective action or closure requirements, and (II) an explicit, *conditional* waiver for "fines, penalties and administrative orders" for violations of corrective action or closure requirements (as defined in the amendment);

(iii) requires that moneys collected from the federal government be sued for environmental programs; and

(iv) adds EPA administrative order authority.

(3) *Section-by-section analysis of the amendment*

(A) Section 1 restates S. 1140's short title.

(B) Section 2 modifies S. 1140's provisions on environmental assessments to—

(i) reflect the language of RCRA section 3016 regarding "inventory of Federal hazardous waste facilities";

(ii) provide that previously submitted assessments do not have to be resubmitted under this Act; and

(iii) expand the list of environmental statutes to include the Emergency Planning and Community Right To Know Act.

(C) New section 3 sets forth (i) the requirement to establish a priority system and (ii) the relationship between this Act (the Federal Facility Compliance Act of 1990) and the waiver of sovereign immunity set forth in section 6001 of RCRA, as amended by this Act. An outline of the approach taken in section 3 is set forth in part 1 of this memo (at page 1).

(D) Section 3 of S. 1140 is redesignated as section 4 and amended. Paragraphs 2 and 3 and the first sentence of paragraph 4 of S. 1140's section 3(a) are amended as follows:

(i) Old paragraph 2 is unchanged but moved to paragaraph 3;

(ii) The substance of old paragraph 3 is unchanged but moved to a different place in section 6001 of RCRA and becomes new paragraph 2 in new section 4(a);

(iii) The substance of old paragraph 4's first sentence is modified to track the waiver language found in other statutes and to include a cross reference to the Federal Facilities Compliance Act of 1990 as it relates to the waiver for imposition of fines and penalties for violations of corrective action or closure requirements. The second and third sentences (on personal liability) are unchanged; and

(iv) A new sentence is added at the end of paragraph 4 to require that moneys collected as fines and penalties from the federal government be used for environmental purposes.

To minimize the length and complexity of section 6001(a), as it would be amended, the modified text of new paragraph 4 is added as a new subsection (b) to section 6001 of RCRA.

ADDITIONAL VIEWS OF MR. WARNER

This Committee has unanimously approved S. 1140, "the Federal Facility Compliance Act." I voted in favor of the legislation because I feel strongly that the Federal Government should comply with all environmental laws and regulations to the same extent as others subject to those requirements. Despite my support for the concept of the legislation, however, I remain concerned that this legislation has the potential to disrupt both the Federal budget and clean-up processes.

S. 1140 WOULD DISRUPT THE PRIORITY-SETTING PROCESS

Specifically, it is my view that S. 1140 will interfere with the Federal Government's ability to set its priorities properly and clean up the worst sites first. S. 1140 would allow the most ambitious and well-organized states to set the Federal Government's priorities, even if sites in those states do not pose the greatest risk to human health. I find it highly unlikely that Congress would consciously choose to allocate resources in such a manner.

S. 1140's disruption of the prioritization process is particularly troublesome because it extends to States the authority to impose fines and penalties under the Resource Conservation and Recovery Act (RCRA) on Federal agencies for the cleanup of old sites. Many of those sites contain violations that occurred prior to the existence of any environmental law.

The Department of Defense is currently actively addressing these very sites through its Defense Environmental Restoration Account (DERA) Program. To date, this program has identified over 15,000 potential sites requiring characterization on over 1,500 installations. Like EPA's Superfund program, the DERA program is being managed on a worst-first basis. DoD has already spent nearly $2.5 billion on its clean-up program and has consistently increased funding levels every year since its inception. Because of this record and DOD's increasing financial support for remedial action, this program should be allowed to go forward as quickly as possible, without disruption.

S. 1140 WOULD DIVERT SCARCE FEDERAL RESOURCES AWAY FROM CLEAN-UP

S. 1140 fails to consider the fact that the Federal Government would be unable to finance clean-up efforts adequately while being subjected to unlimited amount of fines and penalties imposed by the States. This legislation would allow any State to make significant new demands on the Federal Treasury. In these days of severe budget constraints, it is important that the Congress is fully aware of the exact nature of the budget commitments we are making here: they are completely open-ended. I believe that we need to be

sure that the clean-up process goes forward without a "raid" on the Federal Treasury that will only divert money from the intended goal of solving pollution problems.

The Department of Defense has estimated that the potential exposure to fines associated with cleanup of old sites alone—penalties for violations of routine daily operational hazardous waste management requirements—could approach $25 billion over the next 15 years. It is conceivable that the DoD bill for fines and penalties could approach or even exceed what it will cost to clean up all sites requiring action. This level of funding will force DoD into a budget dilemma. They can either clean up or pay fines, but not both. Those states imposing fines will have to determine whether they would prefer to see remedial action go forward or to maintain a permanent new source of revenue from fines.

It is my hope that, before bringing this bill to the Senate floor, the sponsors and supporters of S. 1140 will consider amendments to address the concerns I and others, including the Administration and the distinguished Chairmen of the Senate Committees on Armed Services and Energy and Natural Resources, have raised. First, S. 1140 could be amended to prevent the imposition of fines and penalties associated with corrective actions for old sites. Fines and penalties could still be assessed for violations of routine operational requirements. This would allow the prioritization of clean-up to occur on a nationwide basis, within the budget levels established by the Congress. In addition, S. 1140 could be improved significantly by requiring all necessary Federal agencies, including EPA, and the affected States to participate in a national prioritization process to ensure that Federal resources are applied to the worst sites—not the sites located in states with the most aggressive, but perhaps the most myopic, regulators.

ADDITIONAL VIEWS OF MR. JEFFORDS

I am not opposed to the concept of fines and penalties for non-complying Federal facilities. I am concerned, however, about the source of the revenues used to pay the fines. One amendment I offered was designed to require that administrative fines and penalties, but not criminal penalties, be paid out of the operating budget of the facility itself. Furthermore, fines could not be paid out of allocations for environmental remediation or for operation of environmental facilities. By imposing this limit on the source of funds used to pay fines, I believe compliance would be enhanced. Facility managers would realize in no uncertain terms that they would bear the cost of non-compliance. Greater self-policing would result.

While I believe many of my colleagues share my concern for making the facilities more accountable for compliance, I understand that acceptance of my amendment would have raised committee jurisdictional concerns and was thus defeated. Therefore, in implementing this legislation, it is my hope that states will focus their enforcement efforts and administrative fines towards the goal of making the facility more accountable for its actions and inactions.

CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirements of subsection (4) of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

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